

1 email to Derek Chang, December 3, 2007.

2 Who is Derek Chang?

3 A Derek Chang is the equivalent
4 person to Matt Bond in content acquisition.

5 Q So he is a senior individual at
6 DirectTV?

7 A Yes, sir.

8 Q So you write to this individual at
9 DirectTV - well, first of all you are
10 responding to an email he sent you earlier the
11 same day which is the very bottom of the first
12 page, right?

13 A Yes. This is in response to that
14 email.

15 Q And in that email at the bottom of
16 the page, Chang of DirectTV writes you and
17 says, so Dish brought this to you guys.

18 Now Dish is a reference to
19 EchoStar.

20 A Correct.

21 Q And your answer is no, we asked
22 them for marketing ideas on the quote, steel

1 subs, close quote, initiative in late October,
2 early November, and this was one of their
3 responses.

4 A Yes.

5 Q Does this refresh your memory
6 about an initiative to steal subs from
7 Comcast?

8 A I would say two things. I'm not
9 sure if it's Comcast only. Number two, yes,
10 it refreshes my recollection, and I will kick
11 myself for using infelicitous language.

12 Q You will kick yourself for doing
13 what, sir?

14 A Using infelicitous language.

15 Q You are referring to the steal
16 subs language?

17 A Yes.

18 Q Well, isn't that - however
19 infelicitous it may be, it's a pretty accurate
20 way to describe what you were doing at the
21 time, isn't it?

22 A We were doing a switch campaign,

1 that is correct.

2 Q And a switch campaign is where you
3 were trying to urge cable subscribers,
4 including my client's subscribers, to switch
5 and cancel their contracts with cable and to
6 sign up with satellite TV, correct?

7 A To switch and sign up with
8 satellite TV, yes, that is correct.

9 Q And that actually had the name in
10 the NFL, the switch campaign.

11 A That is correct.

12 Q And you are familiar that in the
13 New York region Comcast has sued the NFL for
14 damages associated with that switch campaign?

15 A I believe that that is correct,
16 yes.

17 Q And were you the person who led
18 this campaign, thought up the idea of this
19 campaign? Or was somebody else the sort of
20 ringleader on it?

21 A I was involved in passing the
22 various aspects of the campaign, which was

1 [REDACTED] by the
2 way. But I would say it was run by -

3 Q Who came up with the idea? Who
4 was leading this switch campaign at the NFL?

5 A I would say that the guy who was
6 responsible for coordinating activities in
7 this respect was Palansky.

8 Q Seth Palansky?

9 A Yes.

10 Q And what was his position?

11 A He was the head of PR for the NFL
12 Network based in Los Angeles.

13 Q You can put that to the side.

14 Last document, last exhibit, Your
15 Honor. And I'm going to change subjects one
16 more time.

17 Did the NFL ever threaten any
18 operators that unless they distributed NFL
19 Network at a certain level they would not be
20 allowed to bid on the eight-game package, the
21 Thursday-Saturday package?

22 A Putting aside the characterization

1 of threat, I would say that probably in '03-

2 '04, [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 Q In addition to telling that to

7 Comcast in 2005, did the NFL also tell

8 EchoStar that unless it increased its

9 distribution you would not let them bid on

10 Thursday-Saturday games?

11 A It's conceivable, but I certainly

12 don't recall it at all.

13 MR. CARROLL: For identification

14 is this is Comcast No. 327, single page Bates

15 number NFL E-0139727. Two emails on a page,

16 dated August 26th, 2005, Your Honor.

17 JUDGE SIPPEL: Comcast No. - what

18 is the number again?

19 MR. CARROLL: Three two seven.

20 JUDGE SIPPEL: Three two seven.

21 And the date?

22 MR. CARROLL: August 26th, 2005.

1 JUDGE SIPPEL: And you identified
2 from who to who?

3 MR. CARROLL: I'm going to do
4 that when I present it to the witness perhaps.

5 JUDGE SIPPEL: All right, well,
6 let's mark for identification as you have
7 described it as Comcast No. 327.

8 (Whereupon the aforementioned
9 document was marked for
10 identification as Comcast Exhibit
11 No. 327)

12 MR. CARROLL: May I distribute?

13 JUDGE SIPPEL: You may.

14 BY MR. CARROLL:

15 Q I've handed you what we've marked
16 as Exhibit No. 327. You see it's two emails
17 from August 26th, 2005, and you are one of the
18 recipients at the top of the page from Mr.
19 Bornstein; do you see that?

20 A Yes, I do.

21 MR. CARROLL: I'd move this into
22 evidence, Your Honor.

1 JUDGE SIPPEL: Any objection?

2 MR. LEVY: No, Your Honor.

3 JUDGE SIPPEL: It's then -

4 Comcast No. 327 for identification is now in
5 evidence as No. 327.

6 (Whereupon the aforementioned
7 document having previously been
8 marked for identification as
9 Comcast Exhibit No. 327 was
10 received into evidence)

11 BY MR. CARROLL:

12 Q And here Mr. Bornstein writes you
13 and several others with respect to an EchoStar
14 update, and he writes, and the language - I'm
15 going to read it as written. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

20 Have I read it correctly?

21 A Yes.

22 Q The 120 relationship, that refers

1 to a distribution level on the EchoStar
2 system, correct?

3 A Correct.

4 Q Does this refresh your memory that
5 Mr. Bornstein who was at the time the head of
6 the NFL Network, right?

7 A Yes.

8 Q He's the head of the NFL Network,
9 he issued the instructions that unless they
10 carried NFL Network at a 120 distribution they
11 would not be permitted to bid on Thursday-
12 Saturday game package?

13 A That's what the language says.

14 MR. CARROLL: Your Honor, at this
15 time we have no further questions for this
16 witness.

17 Thank you.

18 JUDGE SIPPEL: Any redirect?

19 MR. LEVY: Yes, Your Honor, but I
20 will be very very brief.

21 REDIRECT EXAMINATION

22 BY MR. LEVY:

1 Q Mr. Hawkins, do you have Exhibit
2 309 in front of you?

3 A Yes, sir.

4 Q Is this the exhibit that led to
5 questions about the switch campaign?

6 A Yes.

7 Q What is the date of the email at
8 the bottom of the page from which Mr. Carroll
9 quoted?

10 A December 3rd, 2007.

11 Q Was that before or after Comcast
12 tiered the NFL Network?

13 A It was after.

14 Q For fans interested in getting
15 access to or seeing the NFL Network who were
16 subscribers to Comcast, what were their
17 options at that point?

18 A They had the option of purchasing
19 the sports channel from Comcast or switching
20 to a competitor that offered the NFL Network
21 in the basic tier for which they paid their
22 monthly rate.

1 Q And do you know what the cost was
2 for the sports tier on Comcast at that time?

3 A It varied market by market, but it
4 was [REDACTED] a month on top of a digital package.

5 Q So your effort was to try to
6 persuade consumers that they could get a
7 better deal by switching to DirectTV than by
8 staying on Comcast; is that it?

9 A Our effort -

10 JUDGE SIPPEL: Wait a minute,
11 wait a minute. I'm going to give a little
12 leeway to Mr. Levy too.

13 THE WITNESS: Our effort was to
14 inform people of their alternatives. To the
15 extent that DirectTV and others wanted to
16 persuade, that is the context of the
17 aggressive responses; they were all trying
18 special deals to persuade people to switch.

19 MR. LEVY: That's all I have,
20 Your Honor.

21 MR. CARROLL: Your Honor, I have
22 one more question only on that.

1 JUDGE SIPPEL: On that only.

2 MR. CARROLL: That only.

3 RECROSS-EXAMINATION

4 BY MR. CARROLL:

5 Q Do you still have that Exhibit 309
6 in front of you?

7 A Yes.

8 Q In December of 2007, you still had
9 a contract in place with my client, Comcast,
10 correct?

11 A Yes.

12 Q And as of December, 2007, you had
13 a court order from New York declaring that my
14 client had the legal right to move this to a
15 sports tier; correct?

16 A I'd have to think through the
17 sequencing as to whether that order had been
18 vacated on appeal.

19 Q It had not been vacated on appeal
20 until 2008; do you remember that, sir?

21 A I don't, but I'm going to accept
22 your word for it.

1 Q So when you initiated this
2 campaign you did so in the face of a contract
3 with my client that a New York court had
4 determined gave them the absolute right to be
5 doing what they were doing; is that right?

6 A As I said earlier, Mr. Carroll,
7 this was principally directed at Time Warner
8 and others that did not carry the NFL Network.
9 To the extent it was used in Comcast markets,
10 we were apprising people that they had
11 alternatives to what Comcast then believed
12 under the court order in place it had a legal
13 right to do, yes.

14 Q And it's your testimony that the
15 switch campaign to steal subsidiaries was just
16 a campaign to inform people of their options;
17 is that your testimony?

18 A NFL Network ads were intended to
19 inform; others I believe can fairly be
20 characterized as persuaded to switch.

21 Q Barely? Did you say barely or
22 fairly?

1 A No, fairly, others being DirectTV,
2 mostly EchoStar to be honest with you sir,
3 because they were the most aggressive in
4 seeking to market that they had the NFL
5 Network on basic, and others did not.

6 Q Let me cut through it this way.
7 Didn't some of the NFL owners including Mr.
8 Jones of the Dallas Cowboys appear on
9 broadcast stations with the press and urge
10 subscribers, Comcast subscribers, to cancel
11 out their arrangements with Comcast?

12 A I recall him urging Time Warner
13 subscribers in Texas to switch to Grande. And
14 some others that carried the NFL Network. I
15 don't recall at this point, but I am sure you
16 will reflect my recollection if he did, him
17 saying anything about Comcast.

18 MR. CARROLL: It's late in the
19 day, and I will submit that another way rather
20 than doing it this way.

21 BY MR. CARROLL:

22 Q You are not denying that it

1 happened; you just don't remember?

2 A No, I just don't recall.

3 MR. CARROLL: Your Honor, that's
4 all we have for this witness.

5 THE WITNESS: All right.

6 JUDGE SIPPEL: That was a several
7 part one last question.

8 You are excused as a witness.

9 Thank you for your patience.

10 Oh, you're not off the hook yet.

11 So I'm sorry, I apologize to the Bureau.

12 Go right ahead, Mr. Schonman, I'm
13 terribly sorry.

14 MR. SCHONMAN: Thank you.

15 CROSS-EXAMINATION BY COUNSEL FOR THE FCC

16 BY MR. SCHONMAN:

17 Q Mr. Hawkins, do you have any
18 knowledge as to when the Versus and Golf
19 networks were created?

20 A Sometime in the 1990s.

21 Q So it's safe to say that they were
22 already being carried at the time that the NFL

1 Network commenced being carried BY Comcast in
2 2004?

3 A I believe that that is correct,
4 sir.

5 Q And at the time in 2004 when
6 Comcast began carrying the NFL Network, the
7 NFL Network was being carried on the D2 tier?

8 A Yes, sir.

9 Q And at that time the Golf network
10 and the Versus channel were being carried on
11 the expanded analog basic tier?

12 A That is correct.

13 Q What is the difference between the
14 D2 tier and the analog expanded basic tier?

15 A The D2 tier, if you remember I
16 talked about the lineup going up, it would be
17 the fourth tier from the bottom. So it would
18 have more channels than the three tiers below
19 it, but in all probability less subscribers
20 than the three tiers below it.

21 I think at that time, [REDACTED]
22 percent, probably [REDACTED] percent of Comcast subs,

1 took the D2 tier, and I would - my educated
2 surmise would be that approximately [REDACTED]
3 percent of Comcast subs took the analog basic.

4 Q So the analog basic tier was a
5 more widely distributed tier than the D4?

6 A Substantially more widely
7 distributed.

8 Q Do you recall in 2004 any
9 discussion among executives at the NFL Network
10 about filing a discrimination complaint with
11 the FCC because the NFL Network was being
12 carried on a less widely distributed tier than
13 Versus and Golf?

14 A I recall a discussion among
15 executives as to whether we would push for
16 more than D2. And the decision was made, if
17 you remember I referred to a digital driver
18 strategy, earlier in my testimony. The
19 decision was made that D2 would be
20 satisfactory, because we believed that over
21 the next few years digital penetration is
22 going to increase, and the number of

1 subscribers to that tier would approach and
2 eventually equal analog basic.

3 And we were willing as a business
4 matter at that time to try and do a win-win
5 deal with Comcast where it would help them
6 migrate subscribers from analog to digital,
7 which is substantially more bandwidth
8 efficient.

9 Q So between 2004 and the time that
10 the NFL filed this complaint that brought us
11 to this case today, the NFL was satisfied
12 being on D2 even though the Golf imposed its
13 networks or channels, sorry, were being
14 carried on more widely distributed tiers?

15 A As a business matter we found that
16 to be a satisfactory arrangement, yes.

17 Q You are distinguishing between, or
18 you are emphasizing as a business decision.
19 What do you mean by that?

20 A Meaning that we recognized - I
21 want to be careful here not to waive the
22 privilege with respect to the internal

1 discussions in '04. But we were aware of the
2 statutory framework of the Section 616, the
3 nondiscrimination provisions of the
4 Communications Act, and we made a conscious
5 decision at that time that we would rather do
6 a deal than get into a fight. And we would
7 rather do a deal that we thought over the long
8 term was going to create a good relationship
9 with the cable industry.

10 MR. SCHONMAN: No further
11 questions, Your Honor.

12 JUDGE SIPPEL: Anything more?

13 MR. LEVY: No, Your Honor.

14 MR. CARROLL: No, Your Honor.

15 JUDGE SIPPEL: I have no
16 questions.

17 Anybody else have any questions?
18 No, you are excused as a witness.

19 JUDGE SIPPEL: Thank you, sir.
20 You are no longer under oath, but I ask you
21 not to talk about your testimony to any other
22 fact witnesses from the NFL.

1 THE WITNESS: I understand, and
2 will not do so.

3 JUDGE SIPPEL: Thank you, sir.
4 (Witness excused)

5 JUDGE SIPPEL: Next witness.

6 MR. LEVY: Your Honor, we would
7 like to call Dr. Hall Singer, please. If we
8 could just take a few moments to let our
9 colleagues on the other side set up.

10 JUDGE SIPPEL: All right, let's
11 go off the record.

12 (Whereupon at 3:49 p.m. the
13 proceeding in the above-entitled went off the
14 record to return on the record at 3:56 p.m.)

15 JUDGE SIPPEL: All right. We're
16 back on the record., This is a preliminary
17 matter. So I don't want to take too much
18 time. I want to go down and just read into
19 the record again rulings on these Comcast
20 exhibits. It will not take but a minute at
21 best.

22 I was just going to say Comcast

1 number 324, Comcast number 321, Comcast number
2 322, Comcast number 302, Comcast number 305,
3 Comcast number 307, Comcast number 306,
4 Comcast number 332, Comcast number 301,
5 Comcast number 309, and Comcast number 327 as
6 identified on the record are marked as the
7 respective exhibits for Comcast and received
8 in evidence if not already done so. That
9 concludes the receipt of those documents into
10 evidence.

11 And also Enterprises number 186,
12 the written testimony of Mr. Hawkins is marked
13 as 186 and is received in evidence as
14 Enterprises 186.

15 (Whereupon, the aforementioned
16 document, having previously been
17 marked for identification as
18 Comcast Exhibit Number 305, was
19 received in evidence.)

20 JUDGE SIPPEL: Okay.

21 MR. LEVY: Your Honor, there were
22 also two other documents that I offered, the

1 two declarations of Mr. Hawkins, which I think
2 were marked as 187 and 188.

3 JUDGE SIPPEL: You are right.

4 MR. LEVY: And you accepted them
5 into evidence.

6 JUDGE SIPPEL: All right. Well,
7 let me just repeat that, then. Number 187,
8 Enterprises 187, and Enterprises number 188
9 are what: a statement and a supplemental
10 statement?

11 MR. LEVY: Mr. Hawkins. I think
12 it's characterized as a declaration --

13 JUDGE SIPPEL: Declaration.

14 MR. LEVY: -- and a supplemental
15 declaration.

16 JUDGE SIPPEL: Declaration and
17 supplemental declaration are marked
18 accordingly and are received into evidence as
19 Enterprises 187 and 188.

20 MR. LEVY: Correct.

21 JUDGE SIPPEL: Okay. Thank you,
22 sir.

1 MR. CARROLL: Your Honor, for the
2 record, we will not object to those, although
3 I will note those are declarations that
4 preceded the written testimony. They were not
5 listed as direct exhibits.

6 I will just note for the record I
7 don't think it should be a general practice
8 that additional declarations come in on direct
9 beyond the offered written testimony.

10 JUDGE SIPPEL: That is correct.

11 MR. CARROLL: We had understood
12 the written testimony was meant, frankly, to
13 supersede the declarations because it changes
14 and removes some of the things in the
15 declarations.

16 As to this particular witness,
17 though, that just finished, Mr. Hawkins, I do
18 not care enough to object to the introduction.
19 I am just noting for the record that is what
20 they are. And I don't think that is a proper
21 general practice for us to be following.

22 MR. LEVY: I don't think we're

1 going to have an issue. My recollection is
2 that that volume of 200 exhibits that Comcast
3 offered yesterday included some of their
4 declarations as well.

5 And we had not understood the
6 declarations and the testimony needed to be
7 offered at the hearing. That's the only
8 reason that we have offered them now. But I
9 didn't think we were going to have an issue on
10 point.

11 JUDGE SIPPEL: Well, if there's no
12 argument, about the only thing that I'm
13 worried about is do they have the right
14 numbers and have they been received in the
15 record on transcript. And I think we're safe
16 on that.

17 But thank you very much. Thank
18 you for accommodating that, Mr. Carroll. All
19 right.

20 MR. SCHMIDT: May I note one other
21 thing for the record, Your Honor?

22 JUDGE SIPPEL: Yes, sir, Mr.

1 Schmidt.

2 MR. SCHMIDT: We are now calling
3 the first expert witness in this case. The
4 expert witnesses present unique
5 confidentiality issues because they're not
6 just testifying about our documents. They're
7 testifying about the other side's documents.

8 Mr. Gertzog, our client, who has
9 not signed the highly confidential
10 declaration, is in the room. I don't intend
11 to elicit from Dr. Singer any of Comcast's
12 highly confidential information on direct, but
13 I am just putting Comcast on notice of that
14 because we do want to take the position that
15 if they intend to do that with our experts,
16 that only people who have signed the
17 declaration should be in the room. It's just
18 to let you guys know that that is where we
19 stand because I suspect on cross you might
20 introduce some of that information.

21 MR. CARROLL: I guess if you're
22 saying that on direct, you are not planning to

1 get into anything, then Mr. Gertzog is welcome
2 for the direct.

3 Having forewarned us on cross, I'm
4 afraid that to be safe, you would probably
5 have to uninvite him for the cross under the
6 circumstances.

7 MR. SCHMIDT: Understood. And
8 that's why I wanted to raise it.

9 MR. CARROLL: I'm willing to have
10 a discussion about that line if there is some
11 other arrangement we could come to, but for
12 the moment, I think that is the safest course.

13 Thank you for the head's up.

14 MR. SCHMIDT: Sure.

15 JUDGE SIPPEL: Are we all set?

16 MR. SCHMIDT: We are, Your Honor.

17 JUDGE SIPPEL: Okay. The next
18 witness -- and we should probably mark his
19 written testimony also.

20 MR. SCHMIDT: Thank you, Your
21 Honor.

22 JUDGE SIPPEL: Will you identify

1 who your witness is and tell us who he is?

2 MR. SCHMIDT: We would like to

3 call Dr. Hal Singer, Your Honor.

4 Whereupon,

5 HAL SINGER, Ph.D.

6 was called as a witness by counsel for NFL

7 Enterprises and was examined and testified as

8 follows:

9 JUDGE SIPPEL: Dr. Singer is on
10 the stand. Is that correct?

11 MR. SCHMIDT: Yes, sir.

12 JUDGE SIPPEL: And what is his
13 written testimony?

14 MR. SCHMIDT: It would be exhibit
15 189, I believe.

16 JUDGE SIPPEL: Exhibit 189. I'm
17 looking for it in this book. I've got the
18 testimony of Ronald Furman.

19 MR. SCHMIDT: If I may approach,
20 Your Honor, I'll pass out a copy.

21 JUDGE SIPPEL: Okay. Thank you.
22 That will be fine. I think I do have it right